No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

When a taxpayer pays a state tax found to violate clearly established law under the Commerce Clause must the state provide some form of retroactive relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the state elect to provide only prospective relief?[1]

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[1] The issue presented here is identical to the issue disposed of by the Court in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192). *McKesson* clearly established the taxpayer's right to some form of retroactive relief. The more narrow issue for review in this case is whether the state tax in question violated "clearly established law under the Commerce Clause."

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the state courts and this Court are all listed in the caption.

James B. Beam Distilling Co. is a wholly owned subsidiary of American Brands, Inc., a Delaware Corporation. Petitioner has one less than wholly – owned subsidiary, which is DICO Holding Company, a Kentucky Corporation.

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia in *James B. Beam Distilling Co. v. State of Georgia, et al.* is reported at 259 Ga. 363, 382 S.E.2d 95 (1989). The May 27, 1988, Final Order of the Superior Court of Fulton County, State of Georgia, is unreported.

JURISDICTION

The decision of the Supreme Court of Georgia sought to be reviewed was dated and entered on July 14, 1989.

The Order denying Petitioner's Motion for Rehearing before the Supreme Court of Georgia was dated and entered on July 26, 1989.

This Court granted Petitioner's Petition for Writ of Certiorari on June 11, 1990.

The jurisdiction of this Court to review the judgment of the Supreme Court of Georgia is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Official Code of Georgia Annotated § 3-4-60 is set forth in an appendix to this Brief. App., *infra* at 1a. Section 3-4-60 was amended in 1985, and the statute in its amended form is set forth in Pet. App. 2a.

STATEMENT OF THE CASE

Introduction

Prior to 1985, Georgia law required Petitioner James B. Beam Distilling Company ("Petitioner" or "Beam"), as a condition to selling alcoholic beverages to Georgia wholesalers, to pay the applicable state excise taxes on sales of its alcoholic beverage products. O.C.G.A. § 3-4-60 (1982). Prior to 1985, section 3-4-60 of the Official Code of Georgia Annotated ("O.C.G.A.") taxed locally produced

"distilled spirits" at $.50 per liter and locally produced alcohol at $.70 per liter, while taxing their counterparts manufactured outside Georgia at $1.00 and $1.40 respectively. Joint Appendix ("J.A.") at p. 18. In 1982, Beam paid taxes pursuant to O.C.G.A. § 3-4-60 in the amount of $649,000; in 1983 in the amount of $857,000; and in 1984 in the amount of $894,000. J.A., p. 6, ¶¶ 13-16. Therefore, the total of the taxes improperly levied against Beam during the years in question amounts to $2,400,000.[1]

In the trial court below, Beam alleged that O.C.G.A. § 3-4-60 constituted an unconstitutional infringement upon interstate commerce and that Beam therefore was entitled to a refund of the taxes illegally levied and collected. *See generally* Petitioner's Complaint, J.A., pp. 2-9. On May 27, 1988, the Superior Court of Fulton County, State of Georgia, entered its order declaring unconstitutional O.C.G.A. § 3-4-60, as codified during the years in question on appeal – 1982, 1983 and 1984 (the "pre-*Bacchus* statute"). However, the trial court refused to apply its decision retroactively. Thus, the trial court declined to order a refund of the taxes Beam had paid pursuant to the illegal statute. J.A., pp. 29-30, ¶ 9. A true

[1] Georgia has, in effect, a three year statute of limitations on claims for refunds of taxes improperly or illegally assessed. *See* O.C.G.A. § 48-2-35(a)(5). O.C.G.A. § 3-4-60 was amended after this Court's decision in 1984 in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The amended statute has been held constitutional by the Georgia Supreme Court. *See infra*. Therefore, Beam sought a refund in this case of only those taxes paid during the three year period prior to the 1985 revision of the statute.

and correct copy of the court's order is contained in the parties' Joint Appendix at pp. 19-31. The Supreme Court of Georgia affirmed the order of the trial court in all respects and the case is now before this Court on writ of certiorari.

Factual Background

As stated above, prior to 1985, the State of Georgia imposed a tax upon imported alcoholic beverages at twice the rate for the same beverages produced in Georgia from Georgia-grown products. The pre-*Bacchus* statute provided:

> The following state excise taxes are levied and imposed:
>
> (1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;
>
> (2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of $.50 per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of $.70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter.

O.C.G.A. § 3-4-60 (1982), J.A., p. 18.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) ("*Bacchus*"), this Court struck down as unconstitutional a tax imposed by the State of Hawaii identical in its discriminatory effect to O.C.G.A. § 3-4-60. The Hawaii statute imposed a twenty percent tax on sales of liquor at wholesale; however, certain alcoholic beverages made

from locally grown products were exempted from the tax. 468 U.S. at 265. This Court held that the Hawaii tax was discriminatory and unconstitutional on its face.

After this Court's 1984 decision in *Bacchus*, the Georgia Legislature recognized that the constitutional infirmity in Georgia's own statute was undeniable. Nevertheless, the local liquor industry in Georgia went to work behind the scenes in an attempt to preserve the preferential treatment effected through the pre-*Bacchus* statute. For example, attorneys at the Atlanta law firm, King & Spalding, including Georgia's former governor, George Busbee, represented certain vested local liquor interests. The attorneys wrote a letter to Georgia's incumbent Governor Joe Frank Harris. The attorneys noted pointedly that "the purpose of the act [the pre-*Bacchus* statute] was to promote manufacture of liquor and wine in Georgia with Georgia products." Exhibit "A-10" to Beam's Motion for Summary Judgment, Georgia Supreme Court Record (S.R.) at p. 30. The letter also outlined several reasons for maintaining the pre-*Bacchus* tax treatment. One of these was to "[c]ontinue [the] long-standing policy of [the] state not to penalize or increase revenue laws against businesses which have local facilities in the state." S.R. at p. 33. Another reason given to maintain the "status quo" was to avoid wiping out the "incentives given for Georgia industries after millions have been invested in reliance on longstanding public policy and revenue laws . . . . " *Id.* Another reason: "Do not let U.S. Supreme Court change state public policy." *Id.*

Following *Bacchus* and the efforts of Georgia's vested local liquor interests, the Georgia Legislature in 1985 enacted certain superficial changes to O.C.G.A. § 3-4-60 (the "post-*Bacchus* statute"). The changes were made in a

transparent attempt to conform the very same statutory scheme to this Court's decision in *Bacchus* without making any substantive change to the statute, its intent or effect. The approach taken by the Georgia Legislature in the post-*Bacchus* statute is to tax the *importation* rather than the *sale* of imported beverages (the "import approach"). The Legislature hoped in that way to preserve the protectionist scheme since the Twenty First Amendment gives the states broad authority to regulate the "importation" of alcoholic beverages. However, the purpose and effect remain the same, as David Runnion (Senior Assistant Attorney General of Georgia) observed in a Georgia Department of Law interoffice memo:

> The distinction . . . to extract from *Bacchus* regarding state control over 'importation' of alcohol has substantial merit in a purely regulatory context. Here, where the real desire *even in the new legislation* [amended § 3-4-60] is to favor local alcohol industries, I do not feel it would be a winning argument. It is not a superficial argument, but I rate its chances of success in the federal courts as very slim. In light of the way in which the U.S. Supreme Court is headed at the moment, it is my opinion that the only way to completely assure no revenue loss to the state in this area is to amend the foregoing two statutes to impose equal tax rates on all alcoholic beverages.

S.R. at p. 27 (emphasis supplied). Although the Georgia Department of Law was on public record that the "import approach" was invalid under *Bacchus* (S.R. at p. 13, Runnion handwritten notes), the Georgia Legislature at the urging of local liquor lobbyists failed to heed Mr. Runnion's advice. Instead the Georgia Legislature apparently gave in to what Mr. Runnion described as a "strong move

afoot to try [the import approach] out in the courts . . . and see if the local break can be saved." S.R. at p. 13 (handwritten notes).

The pre-*Bacchus* statute and the post-*Bacchus* version of it are set forth in Appendix 1a and 2a, respectively, to the Petitioner's Brief. Obviously, the changes effected by the Georgia Legislature in 1985 were purely cosmetic, and not unlike those changes recently rejected by this Court in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192). The pre-*Bacchus* statute had imposed a tax on the importation of all distilled spirits and alcohol into the State at twice the rate of the taxes imposed on the same items when manufactured in Georgia and made from Georgia-grown products. The post-*Bacchus* statute taxes these goods based on the volume of alcoholic beverages sold.

The discrimination against out-of-state producers is achieved by splitting the taxes into two portions. One portion of the "new" tax consists of an "excise" tax imposed on all alcoholic beverages wherever produced. The second portion of the tax is imposed only on out-of-state products as an "import" tax, *i.e.*, the "import approach."

The continued discriminatory effect of the post-*Bacchus* statute is illustrated through the following example. Like their Georgia-produced counterparts, distilled spirits produced outside of the State of Georgia bear an "excise" tax of fifty cents per liter. A liter of the same beverage produced outside of the State of Georgia not

only bears the $.50 excise tax, but further bears an additional "import" tax of fifty cents. Thus, the liter of distilled spirits produced in Georgia bears only the "excise" tax of $.50; the liter of distilled spirits produced outside of Georgia bears a total tax of one dollar.

In the self-serving preamble to the Act enacting the post-*Bacchus* statute, the Georgia Legislature disclosed a newfound statutory purpose: "to provide for the increased cost of administration and collection of revenues; to aid in the exercise of the police power; to promote temperance . . . . " Ga. L. 1985, p. 665. Section 1 of the 1985 Act states:

> [T]he General Assembly finds and determines the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines produced within this state and further finds and determines that it is in the best interest of the citizens of this state that the increased costs be provided for by taxation.

Ga. L. 1985, p. 665; *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E. 2d 190, 195 (1987), *appeal dismissed*, 107 S.Ct. 3253 (1987). Clearly the Legislature took a rather backward approach in drafting a purpose provision to fit the Act.

Petitioner proved in the trial court that the purpose and effect of the pre-*Bacchus* statute were to discriminate against out-of-state producers of alcoholic beverages and unfairly to promote local commerce in the form of in-state producers. Finding as a matter of law that the purpose *and* the effect of the statute were to protect alcoholic beverages made with Georgia-grown products from out-of-state competition, the trial court held the statute

unconstitutional under the Commerce Clause of the United States Constitution, Article 1, Section 8, clause 3 (the "Commerce Clause"). (The Commerce Clause is set forth in Appendix 3a to Petitioner's Brief.)

At paragraph 5 of its order granting summary judgment, the trial court stated:

> This Court further holds that the purpose of O.C.G.A. § 3-4-60, as it existed during the years in question, was economic protectionism, *i.e.*, to benefit local business and local industry. This purpose is indicated by the legislative history, 1937-38 Ga. Laws Ex. Sess. 115, 117 (alcohol and distilled spirits).
>
> * * *
>
> The protectionist purpose of the statute is further indicated by the Exhibits "A-3" through "A-13" produced by the plaintiff [Petitioner] in opposition to the defendants' [Respondents'] Motion for Summary Judgment and produced to plaintiff by the defendants pursuant to this Court's Order of December 3, 1987.
>
> "Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting an inquiry into the balance between local benefits and the burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Bacchus*, 468 U.S. at 270.

J.A., pp. 26-27.[2] The Superior Court declined, however, to apply its decision retroactively so as to provide Beam

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[2] The Exhibits "A-3" through "A-13" to which the trial court made reference consist of documents produced by the State to Beam pursuant to a discovery order of the trial court. Some of the exhibits are referenced at pp. 5-8, *supra*.

with any remedy for the effect of the offending statute. J.A., pp. 29-30, ¶¶ 8-9.

On appeal the Georgia Supreme Court agreed that the pre-1985 statute was constitutionally deficient and upheld the trial court's rulings in all respects. J.A., p. 101, section 1. The court stated, "The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was [sic] simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution." *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 364, 382 S.E.2d 95, 96 (1989) (citation omitted).

Beam does not challenge the Georgia Supreme Court's ruling that the statute was unconstitutional. However, the Georgia Supreme Court also endorsed the trial court's holding that the ruling as to unconstitutionality would be given prospective application only so as to deny Beam a refund of the taxes it had paid under the defective pre-*Bacchus* statute. Rather than apply the strict letter of a Georgia statute mandating a refund,[3] the

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[3] O.C.G.A. § 48-2-35 (Appendix 4a) provides, in pertinent part, as follows: "(a) a taxpayer *shall be refunded* any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state . . . . " (emphasis supplied). As noted in *Bacchus, supra*, 468 U.S. at 277, n. 14, "it may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." However, the Georgia Supreme Court, noting "at least two other lawsuits currently pending in which other alcohol producers seek over $28,000,000 in tax refunds . . . . " (J.A., p. 103), declined a literal application of the statute so as to deny the Petitioner the relief mandated by the statute.

Georgia Supreme Court applied the criteria prescribed by this Court in *Chevron Oil v. Huson*, 404 U.S. 97 (1971) ("*Chevron Oil*"), so as to avoid the retroactive application of its decision.

Beam then filed its Petition for Writ of Certiorari on October 16, 1989. This Court granted the Petition in the wake of its rulings in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) and *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704 (U.S. June 4, 1990) (No. 88-325). These cases resolved issues related to those presented in the instant appeal.

SUMMARY OF THE ARGUMENT

Official Code of Georgia Annotated § 3-4-60 effected a scheme which taxed liquor manufactured from products grown outside the State of Georgia at twice the rate of the tax applied to liquor grown from in-state products. The tax was ruled unconstitutional by the Supreme Court of Georgia in the wake of this Court's decision in *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263 (1984). Moreover, the Supreme Court of Georgia sustained the trial court's factual finding that the statute had been enacted solely for the purpose of insulating Georgia's domestic liquor industry from interstate competition. In 1985 the Georgia Legislature implemented superficial changes in the statute in an effort to preserve Georgia's tax break for its domestic liquor industry and in direct defiance of the principles established by this Court in *Bacchus* and its

predecessor decisions. However, the purpose and effect of the statute remain the same.

Petitioner James B. Beam Distilling Company ("Beam") paid taxes totalling $2,400,000 during the three year period prior to the amendment of the statute. In the trial court Beam sought to recoup these payments, which were definitively declared constitutionally invalid in *Bacchus*. Both the trial court and the Supreme Court of Georgia ruled the statute unconstitutional, yet failed to grant Beam a refund of the taxes paid by applying their decisions prospectively only. Thus, the issue before this Court is whether the Georgia courts' failure to grant the Petitioner a refund violates the due process principles established in the recent case of *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) ("McKesson"). *McKesson* confirmed a taxpayer's right to retroactive relief when the taxpayer has been compelled by state law to pay taxes based upon a statute that unconstitutionally discriminates against out-of-state manufacturers, and *McKesson* requires a refund by the State in this instance as well.

Since the taxes here were paid prior to this Court's ruling in *Bacchus*, the Georgia courts sought to avoid a refund by refusing to give retroactive application to the *Bacchus* decision. However, a decision of nonretroactivity requires the application of the three criteria established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The *Chevron Oil* criteria clearly militate against nonretroactive application. Therefore the Court should apply the *Bacchus* decision in its customary manner, *i.e.*, retroactively.

The first criterion under *Chevron* requires that before the Court will consider non-retroactive application it must be established that the decision to be applied either overruled clear past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed. The *Bacchus* decision did not overrule *any* past precedent. Rather, *Bacchus* represented the culmination of a long line of case authority proscribing protectionist measures implemented by the states in violation of the Commerce Clause of the United States Constitution. "It has long been the law that states may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states.' *Guy v. Baltimore*, 100 U.S. 434 (1880)." *Bacchus*, 468 U.S. at 272-273.

In the wake of the passage of the Twenty-First Amendment, this Court issued certain decisions implying that the states were unfettered by the Commerce Clause when regulating in the area of alcoholic beverages. However, long before the taxes sought to be refunded in this case were paid, this Court made clear that where the animus of state legislation is pure economic protectionism, not even the sanction of the Twenty-First Amendment can save the offending statue. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). Thus, not only did *Bacchus* not overrule any prior precedent, its coming was foreordained as early as 1964.

Where the first *Chevron Oil* criterion is not met, there is no occasion to consider the remaining two criteria, and a decision is applied retroactively. Even so, the remaining

criteria militate strongly against nonretroactivity. First, the second criterion requires that the Court determine whether retroactive application will advance the purpose of the rule in question – in this case the Commerce Clause. The central purpose of the Commerce Clause is to promote interstate commerce and break down protectionist barriers to that commerce. Retroactive application in this case would restore some of the competitive balance distorted by the State of Georgia when it erected barriers to competition from outside its borders. Moreover, this Court has specifically recognized intransigence in the application of its decisional principles as a valid consideration when considering nonretroactivity. In the instant case, rather than seek to comply with this Court's decision in *Bacchus*, Georgia deliberately sought to evade the principles established in that case.

Finally, *Chevron Oil* requires that the Court consider any inequity that would result from retroactive application. However, this Court has also noted that the inequity posed by the possibility of burdening a state's financial operations may be "largely irrelevant" where the State "violates constitutional norms well established under existing precedent." In this case, Georgia continued to violate those constitutional norms long after the State had any right to assume that its protectionist scheme was constitutional.

ARGUMENT

I. WELL-ESTABLISHED PRINCIPLES OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT DICTATE THAT BEAM IS ENTITLED TO A CLEAR AND CERTAIN BACKWARD-LOOKING REMEDY

Although the Georgia Supreme Court agreed that the purpose and effect of the pre-*Bacchus* statute constituted simple economic protectionism, the court nevertheless declined to grant Beam a remedy. This issue can only be analyzed in the light of a recent decision of this Court just prior to the Court's grant of Beam's Petition for Writ of Certiorari. In *McKesson v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) ("*McKesson*"), the Court clearly established a taxpayer's right to retroactive relief when the taxpayer has been compelled by state law to pay taxes to the state based upon a statute that unconstitutionally discriminates against out-of-state manufacturers. The facts and issues in *McKesson* bear a striking resemblance to those of the instant case.

In *McKesson*, the State of Florida had, prior to *Bacchus*, passed a statute for the purpose of taxing the sale of certain alcoholic beverages that was very similar to the Hawaii statute struck down in *Bacchus*. After *Bacchus*, the Florida Legislature passed a new statute, which was at issue in *McKesson*. As in the instant case, the state courts in *McKesson* held the statute at issue to be unconstitutional under the Commerce Clause. The state courts nevertheless refused to grant the taxpayer any retrospective relief. This Court framed the issue before it to be

"whether federal law entitles [the petitioner] to a partial tax refund." *McKesson, id.*, 58 U.S.L.W. at 4667.

Turning to that issue, the Court held that "if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.*, 58 U.S.L.W. at 4668-69 (footnotes omitted). As is allowed under the Due Process Clause, Florida had declined to provide any pre-deprivation process for the exaction of taxes, establishing instead "various sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved." *Id.*, 58 U.S.L.W. at 4670 (emphasis in original, footnote omitted). Holding that to mean that Florida "requires taxpayers to raise their objections to the tax in a post-deprivation refund action," the Court then held that "in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the law is a meaningful one." *Id.*, 58 U.S.L.W. at 4671 (footnote and citation omitted). The Court then held that the State could not, consistent with the Due Process requirements of the Fourteenth Amendment, refuse to grant the petitioner retroactive relief in the refund proceeding. *Id.*, 58 U.S.L.W. at 4672.

In reaching its conclusion in *McKesson*, the Court drew upon a long line of well-settled authority reaching

back to *Atchison, Topeka, & Santa Fe RY Co. v. O'Connor*, 223 U.S. 280 (1912) ("*O'Connor*"). In that case the Court stated, "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy." *Id.*, 223 U.S. at 285. In addressing the argument that the State of Colorado should not be required to repay money already in its treasury, Justice Holmes referred to a Colorado statute very similar in operation to the Georgia refund statute implicated in the instant case, O.C.G.A. § 48-2-35. Justice Holmes stated, "It would seem that the statute contemplated the course taken by the plaintiff and provided against any difficulty in which the Secretary of State otherwise might find himself in case of a disputed tax." *Id.*, 223 U.S. at 287. The Court held that the State was required to refund to the plaintiff the taxes illegally paid.

In *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928), the Court held that invalidation of a taxing statute after the tax had been paid was insufficient. The State was also required to give the taxpayer a retrospective remedy. "Plaintiff in Error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury." *Id.*, 276 U.S. at 504-05.

In *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Court made clear that the State's obligation to repay taxes paid under duress arises out of the Fourteenth Amendment. In that case, the State had argued that it was not required to repay the tax, because it alleged that the tax was paid on an untimely basis. The taxpayer responded that he had

paid the tax under compulsion to prevent, among other things, the "accumulation of statutory penalties." *Id.*, 280 U.S. at 369. The Court held that a "denial by state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Id.*

The instant case finds itself on all fours with the facts of *McKesson* and the holdings of the cases upon which the Court relied in *McKesson*. Beam paid the taxes required of it without any meaningful pre-payment process available. Beam was required either to pay the tax pursuant to the pre-*Bacchus* statute or it could not sell its products in the State of Georgia. O.C.G.A. § 3-4-61(2). When Beam then pursued the post-deprivation remedy ostensibly provided to it under O.C.G.A. § 48-2-35, the State of Georgia simply ignored the request for a refund until Beam sought relief in the Georgia courts. J.A., pp. 7-8, ¶¶ 18-20. Even there, the State of Georgia sought to avoid the constitutional requirement of a "clear and certain remedy" by maintaining that *Bacchus* should not be applied retroactively.[4]

Under the line of authority cited in *McKesson* which dates as far back as 1912, seventy-two years before this Court's decision in *Bacchus*, it is clear that federal due

[4] The State of Florida and the Florida courts contended in *McKesson* that the decision holding the statute at issue to be unconstitutional should have been applied prospectively only. A plurality of this Court rejected that notion, stating in *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704, 4708 (U.S. June 4, 1990) (No. 88-325; ("*ATA*"), decided by this Court on the same day as *McKesson*, that *McKesson* "involved only the application of settled Commerce Clause precedent."

process principles require Georgia to develop a post-deprivation procedure so as to provide a "clear and certain remedy" for the deprivation of tax monies in an unconstitutional manner. These precedents estabish beyond doubt that Beam is entitled to postpayment, or retrospective relief for having paid taxes pursuant to a tax scheme which was ultimately found unconstitutional.

This conclusion is easily reachable without going further in analysis and without trundling out the *Chevron Oil* test of nonretroactivity relative to *Bacchus*. Under *McKesson*, Beam is entitled to retrospective relief for having paid the taxes at issue pursuant to a constitutionally invalid statute.

II. UNDER THE CRITERIA ESTABLISHED BY THE COURT IN *CHEVRON OIL*, *BACCHUS* SHOULD BE APPLIED RETROACTIVELY

The Supreme Court of Georgia justified the denial of a clear and certain remedy for Beam on the stated basis that its decision should not be applied retroactively. Apparently referring to this Court's decision in *Bacchus* rendered on June 29, 1984, the Georgia Supreme Court stated, "Applying the first prong of the *Chevron* test we note that the decision does not now [July 14, 1989] establish a 'new rule.' However, if the decision had been rendered during 1984, the last year that the tax was assessed, it would certainly have overruled past precedent." *James B. Beam Distilling Co. v. State, supra*, 259 Ga. at 365, 382 S.E.2d at 96. Thus, the Georgia Supreme Court acknowledged that *Bacchus* was sufficiently controlling as of June 29, 1984 to establish that the pre-*Bacchus* statute

was unconstitutional. In deciding the retroactivity issue before the Court in the instant case, this Court must decide whether *Bacchus* is to be given retroactive application.

On the issue of non-retroactive application of decisional law, the analysis must start with the "usual rule . . . that federal cases should be decided in accordance with the law existing at the time of decision." *Saint Francis College v. Al-Khazraji*, 107 S.Ct. 2022, 2025 (1987) (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801)). *See also Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1922 (1989) (referring to "the customary rule of retroactive application").

This Court decided a second pertinent case shortly before granting Beam's Petition for Writ of Certiorari. *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704 (U.S. June 4, 1990) (No. 88-325) ("*ATA*"), decided by this Court on the same day as *McKesson*, addresses the issue of when a decision of the Supreme Court is to be applied prospectively only. In *ATA*, certain of the taxes at issue were paid prior to this Court's decision in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987) ("*Scheiner*"). In *Scheiner*, the Court had held similar taxes to be unconstitutional. As in *McKesson* and the instant case, the taxes paid in *ATA* were held to penalize out-of-state entities in violation of the Commerce Clause. Since some of the taxes at issue in *ATA* were paid prior to *Scheiner*, and since prior holdings of the Court would

have supported the constitutional validity of the tax under the Commerce Clause, the question before the Court was whether to apply *Scheiner* retroactively. Using the criteria established in *Chevron Oil, supra*, 404 U.S. 97 (1971), a plurality of the Court in *ATA* declined to give *Scheiner* retroactive application. The Court thereby held that ATA was not entitled to any remedy for taxes paid prior to *Scheiner*. The Court's plurality opinion stated, "In sum, we conclude that applying *Scheiner* retroactively would 'produce substantial inequitable results.' *Chevron Oil*, 404 U.S. at 107." *ATA, supra*, 58 U.S.L.W. at 4709.[5]

As in *ATA*, the question before the Court here is whether the Georgia Supreme Court properly applied the three-pronged test set forth in *Chevron Oil* in determining whether or not its decision on the pre-*Bacchus* statute and *Bacchus* should be given retroactive application. If the constitutional decision below and *Bacchus* were to be given prospective application only, then Beam would have paid without recourse $2,400,000 pursuant to the unconstitutional pre-*Bacchus* statute. If the constitutional decision below and *Bacchus* are applied retroactively, then the State of Georgia must provide Beam with a clear and certain remedy consistent with the holding of this Court in *McKesson*.

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[5] Concurring in the judgment of the Court in *ATA*, Justice Scalia stated that "[s]ince the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *ATA, supra*, 58 U.S.L.W. at 4714.

"The determination whether a constitutional decision of this Court is retroactive – that is, whether the decision applies to conduct or events that occurred before the date of the decision – is a matter of federal law." *ATA, supra,* 58 U.S.L.W. at 4707. In *ATA,* the plurality of the Court reiterated the *Chevron Oil* test:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent *on which litigants may have relied,* or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S., at 106-107 (citations and internal quotations omitted).

ATA, supra, 58 U.S.L.W. at 4707-08 (emphasis supplied). Applying these principles leaves little doubt that Beam is entitled to the type of retrospective remedy described in *McKesson.*

A. *Bacchus* Did Not Establish a New Principle of Law, Either by Overruling Clear Past Precedent or by Deciding an Issue of First Impression Whose Resolution was not Clearly Foreshadowed

The instant case contrasts sharply with *ATA.* In *ATA* the Court easily determined that *Scheiner* met the first of the three-pronged *Chevron Oil* criteria because it overruled prior precedent upon which the Arkansas Legislature may have relied in establishing the taxing scheme ruled unconstitutional in *Scheiner.* "We think it obvious that *Scheiner* meets the first test of nonretroactivity. Both the majority and dissent in that case recognized that the Court's decision left very little of the *Aero Mayflower* line of precedent standing." *ATA, supra,* 58 U.S.L.W. at 4708.

Bacchus did not overrule any prior precedent. *Bacchus* simply affirmed longstanding Commerce Clause doctrine prohibiting state legislatures from implementing legislation purely to benefit local interests while impeding the flow of interstate commerce. "It has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.' *Guy v. Baltimore,* 100 U.S. 434, 443 (1880)." *Bacchus,* 468 U.S. at 272-73.

This Court stated the principle controlling the constitutionality of the pre-*Bacchus* statute as early as 1977: "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977) ("*Boston Stock Exchange*") (quoting *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959)). Applying this well-established and "cardinal" rule to the statute at issue in *Bacchus,* this Court easily found the *Bacchus* statute to be unconstitutional. *See Bacchus, supra,* 468 U.S. at 268, (quoting *Boston Stock Exchange*).

The Court then rejected the implication that the Twenty-First Amendment validated the otherwise invalid tax:

> The State contends that a more flexible approach, taking into account the practical effect and relative burden on interstate commerce, must be employed in this case because (1) legitimate state objectives are credibly advanced, (2) there is no patent discrimination against interstate trade, and (3) the effect on interstate commerce is incidental. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624, (1978). On the other hand it acknowledges that where simple economic protectionism is effected by state legislation, a stricter ruler of invalidity has been erected. *Ibid.* See *also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, (1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37, (1980).

Id., 468 U.S. at 270. Moreover, "[e]xamination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Id.* at 271. Further:

> No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a state can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to ensure . . . against discriminating State legislation." *Welton v. Missouri*, 91 U.S. 275, 280 (1876).

Id. As in *Bacchus*, this case presents no dispute as to the State's motivation of economic protectionism in enacting the offending statute.

Not only was this "strict scrutiny" rule clearly established by 1982 (the tax year first in question in the instant case), but the standard under which simple economic protectionism was to be determined was clearly established. Economic protectionism could be established by either discriminatory purpose or discriminatory effect. *See Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. 457, 471 n. 15 (1981); *Philadelphia v. New Jersey, supra*, 437 U.S. 617, 624 (1978); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977). *See also Bacchus, supra*, 468 U.S. at 270. (relying upon the cases cited herein). Under this clear line of authority, the State of Georgia simply cannot contend that it relied in good faith upon the precedent of this Court in believing in 1982, 1983 and 1984 that the pre-*Bacchus* statute was constitutional.[6]

The cases decided pursuant to the Twenty-First Amendment to the Constitution upon which the State would rely do not vary the Commerce Clause jurisprudence discussed above. Had the pre-*Bacchus* statute been challenged in 1940 rather than in the latter part of the Twentieth Century, the State would have had a better

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[6] Without even attempting to analyze the case law of this Court under the Twenty-First Amendment and the Commerce Clause, the Georgia Supreme Court relied upon its own 1939 decision upholding the constitutionality of the forerunner of the pre-*Bacchus* statute. *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 365, 382 S.E. 2d 95, 96 (1989) (citing *Scott v. State*, 187 Ga. 702, 2 S.E. 2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 225 Ga. 15, 334 S.E.2d 679 (1985)). Solely because of the Georgia Supreme Court's own ruling in *Scott* did the court decide that *Bacchus* met the first of the *Chevron Oil* criteria for non-retroactivity.

argument that the Twenty-First Amendment validates the otherwise unconstitutional pre-*Bacchus* statute. This argument became patently wrong long before Beam paid the taxes at issue in the instant case.

Referring to decisions of this Court decided within the early years following ratification of the Twenty-First Amendment, this Court held in 1964 that to "draw a conclusion from this line of decisions that the Twenty-First Amendment was somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964). Thus, early suggestions in dicta that the Twenty-First Amendment left states unfettered by the Commerce Clause when dealing with intoxicating liquors could no longer be relied upon. *See, e.g., Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Michigan*, 305 U.S. 391, 394 (1939) (stating that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. . . . "); *Joseph S. Finch & Co. v. Burk*, 305 U.S. 395 (1939) ("Since that [A]mendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) ("The Twenty-First Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."); *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401, 403 (1938) ("That under the [Twenty-First A]mendment discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was

settled by [*Young's Market*]."); and *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59 (1936) ("*Young's Market*") (upholding a license fee of $500 for the privilege of importing beer into the State of California despite the Court's conclusion that "[p]rior to the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege.").

By 1945, the broad-sweeping notion that the Twenty-First Amendment left the States unfettered by the Commerce Clause had been squarely rejected. In *United States v. Frankfort Distilleries*, 324 U.S. 292 (1945), the Court considered whether the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, promulgated by Congress pursuant to the Commerce Clause, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980), could apply to conduct affecting commerce in alcoholic beverages. Without difficulty, the Court held that the Twenty-First Amendment did not preclude application of the Sherman Act to commerce involving intoxicating beverages. Thus, the Commerce Clause indisputably placed limitations upon the states' powers in regulating commerce in alcohol despite the Twenty-First Amendment.

In 1964, the Court again grappled with the tension between the federal and state governments when regulating the flow of alcoholic beverages in commerce. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court expressly held that the Twenty-First Amendment does not override the Export-Import Clause of the United States Constitution, Article I, Section 10, clause 2. Thus, the State could not constitutionally

place a direct tax on intoxicating beverages coming into its territory from abroad.

On the same day in 1964, the Court considered whether the State of New York could prohibit a retailer at an international airport from selling alcoholic beverages in contravention of the State's laws regarding such retail sale. As stated above, the Court expressly acknowledged the early line of cases under the Twenty-First Amendment and the broad language contained in them. The Court left no doubt, however, that the Twenty-First Amendment did not leave the States unfettered by the Commerce Clause, characterizing as "absurd" the conclusion that the Twenty-First Amendment had repealed the Commerce Clause "wherever regulation of intoxicating liquors is concerned." *Idlewild, supra*, 377 U.S. 324, 331-32 (1964). The Court went on to explain that "[b]oth the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete sense." *Id.*[7]

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[7] In point of fact, this Court decided long ago that these broad-sweeping proclamations constituted dicta in the cases in which they were made. As early as 1938 in *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938), the Court held that "Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." Likewise in *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939), the Court found no substance in the argument that Congress no longer had the

(Continued on following page)

Accordingly, by 1964, the broad-sweeping language of the early Twenty-First Amendment cases which may have appeared to release the States from Commerce Clause scrutiny with respect to issues impacting trade in intoxicating liquors had been overruled by this Court. Either the Court viewed the broad language from the prior cases to constitute dicta only, or the Court had flatly overruled their holdings.[8]

(Continued from previous page)

authority after the ratification of the Twenty-First Amendment to control importation of alcoholic beverages into the United States under the Federal Alcohol Administration Act.

[8] In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the Court reaffirmed what it had held in *Idlewild*. "[The second section of the Twenty-First Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Id.* at 42. In that case, the Court considered New York's statute requiring liquor suppliers to affirm that their posted prices were at least as low as prices charged in other states during the previous month. The Court held that the statute did not violate the Commerce Clause. Because the statutory scheme had not yet been put into effect, the Court considered the constitutional validity of the scheme on its face only. *Id.* at 41.

In *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down a scheme that was similar to the one considered in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The controlling difference between the two statutes was that the statute at issue in *Brown-Forman* prohibited the suppliers from changing their prices in other states without amending their affirmations to reflect the change. *Brown-Forman, supra*, 476 U.S. at 581. *See also Healy v. The Beer Institute, Inc.*, 109 S.Ct. 2491 (1989) (striking down a similar Connecticut statute on grounds similar to the Court's analysis in *Brown-Forman*).

Between 1966 and 1982, the first year of taxation at issue in the instant case, the Court had occasion to address the limitations of the Twenty-First Amendment with respect to other constitutional provisions. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court struck down under notions of Fourteenth Amendment due process a state law that allowed state officials to post publicly the names of persons with a history of alcohol problems without first affording those persons an opportunity for notice and a hearing. The Court thus affirmed that the Twenty-First Amendment did not pro tanto repeal other provisions of the Constitution with respect to issues impacting intoxicating liquors.

In *California v. LaRue*, 409 U.S. 109 (1973) (*"LaRue"*), the Court considered State regulations that restricted certain "lewd" behavior on premises licensed to sell liquor by the drink. *LaRue* clearly involved the police power of the State. The State promulgated the regulations in question in response to findings that the lewd behavior practiced at certain establishments where liquor by the glass was served led to violent and criminal behavior. The Court stated, "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority *over public health, welfare, and morals." Id.*, 409 U.S. at 114 (emphasis supplied). The Court acknowledged that the early Twenty-First Amendment cases "did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions

of the United States Constitution in the area of liquor regulations."

In this context, the Court upheld California's regulations against a First Amendment challenge under a rational basis analysis. Because of the interplay of the First Amendment and the Twenty-First Amendment with respect to the states' police powers, the Court did not hold the State to the stricter standard established in the Court's prior First Amendment obscenity cases. *Id.* 409 U.S. at 116 (citing *United States v. O'Brien*, 391 U.S. 367 (1968); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, (1958); and *Roth v. United States*, 354 U.S. 476 (1957)).

In *Craig v. Boren*, 429 U.S. 190 (1976), the Court considered the tension between the Twenty-First Amendment and the Equal Protection Clause of the Fourteenth Amendment. There, the State discriminated between male and female consumers of beer on the basis of age. Even in the face of the State's exercise of its police power on an issue of temperance, the Court held that the Twenty-First Amendment did "not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." *Id.*, 429 U.S. at 204-05. These cases clearly put to rest any notion that, particularly in economic matters, the Twenty-First Amendment gave the states *carte blanche* with respect to intoxicating liquors.

In 1980, the Court was faced with a direct conflict between a State's economic regulation of commerce in alcoholic beverages under the Twenty-First Amendment and the federal government's regulation of interstate commerce under the Commerce Clause. In *California*

Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ("*Midcal*"), the Court held that California's retail price maintenance and price posting statutes for the wholesale wine trade violated the Sherman Act. The Court framed a further issue before it: "whether § 2 [of the Twenty-First Amendment] permits California to countermand the congressional policy – adopted under the commerce power – in favor of competition." *Id.*, 445 U.S. at 106. The Court again revisited the early Twenty-First Amendment cases commencing with *Young's Market*. The Court stated:

> The Twenty-first Amendment grants the States virtually complete control over *whether to permit importation or sale of liquor and how to structure the liquor distribution system*. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. *The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."*

Id., 445 U.S. at 110 (citing *Idlewild, supra*, 377 U.S. at 332, emphasis supplied). Following this analysis, the Court concluded that the Twenty-First Amendment "provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program." *Id.*, 445 U.S. at 114. Even if notions that the states were unfettered by the Commerce Clause with respect to regulation of alcoholic beverages had not disappeared by the time of *Idlewild* in 1964, they clearly had disappeared by *Midcal* in 1980.

A close analysis of this Court's decisions compels the conclusion that the pre-*Bacchus* statute at issue in the

instant case violated Commerce Clause doctrine well settled by 1982, 1983 and 1984. *Bacchus* did not change the law in this respect. The purpose and effect of the pre-*Bacchus* statute were to provide economic protection to Georgia producers of alcohol and the agricultural products from which it is made. The purpose and effect were to the detriment of out-of-state producers. As even the Georgia Supreme Court acknowledged, this purpose and effect precluded further scrutiny of the pre-*Bacchus* statute by the courts. *James B. Beam Distilling Co v. State, supra*, 259 Ga. at 364, 382 S.E.2d at 96. *See also Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. 457, 471 (1981); *Lewis v. BT Investment Managers, Inc., supra*, 447 U.S. 27, 36-37 (1980); and *Philadelphia v. New Jersey, supra*, 437 U.S. 617, 624 (1978). Neither the Twenty-First Amendment nor this Court's case law construing the Twenty-First Amendment justified the State in believing as late as 1982 that it could tax importers of alcoholic beverages in a manner that directly contravened clearly-established principles under the Commerce Clause.

In fact, none of this Court's Twenty-First Amendment cases leading up to *Midcal* even dealt with a direct tax on liquor products. By the time *Midcal* was decided in 1980, the State clearly had to be able to show some purpose and effect for the pre-*Bacchus* statute other than economic protectionism, a State interest that clearly would not outweigh the federal interests protected by the Commerce Clause. Once the Georgia courts found that the only purpose behind and effect of the pre-*Bacchus* statute were to discriminate against out-of-state producers, Beam became entitled to a clear and certain remedy under the principles discussed in *McKesson, supra*.

Another recent case from this Court sheds substantial light on this analysis. In *Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3832 (U.S. June 28, 1990) (No. 88-421) (*"Ashland Oil"*), the Court considered the issue of retroactive application of one of its Commerce Clause decisions. In *Ashland Oil* a gross receipt tax was imposed by the State of West Virginia on persons selling tangible property at wholesale. Local manufacturers were exempt from the tax. The Court was required to determine whether to give retroactive application to *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (*"Armco"*), which rendered invalid the West Virginia taxing scheme as an impermissible infringement upon interstate commerce. Reviewing the decision of the West Virginia Supreme Court to withhold retroactive application of *Armco*, the Court stated:

> Relying on its state-law criteria for retroactivity, *see Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E. 879 (1979), which it considered to 'follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co. v. Huson*, . . . the [West Virginia Supreme] Court determined that *Armco* 'represented a reversal of prior precedent, and that retroactive application of the *Armco* rule would cause severe hardship.' *Id.*, at ___, 350 S.E.2d at 536.

Ashland Oil, supra, 58 U.S.L.W. at 3832.

Reversing the decision of the West Virginia Supreme Court, this Court held that *Armco* did not overrule clear past precedent or decide an issue of first impression. Significantly, the Court in *Armco* relied upon *Boston Stock Exchange, supra*, 429 U.S. 318 (1977), in holding that a state may not discriminate between transactions solely because of some interstate element. *Id.* "On its face, West

Virginia's statutory scheme had just such a discriminatory effect, as it 'provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it.' *Armco, supra*, at 642." *Id.* The *Bacchus* Court relied as well on *Boston Stock Exchange* in support of its decision that the Hawaii statute had a similar discriminatory effect "depending on whether the taxpayer conducts manufacturing in the State or out of it." *Bacchus*, 468 U.S. at 272. Like *Armco, Bacchus* did not overrule any prior authority, nor did it decide an issue of first impression that was not clearly foreshadowed by prior case law. The instant case and *Ashland Oil* are directly analogous.

In *Bacchus* this Court cited case law reaching back into the 1800's to support its decision that Hawaii's tax enacted for the express purpose of promoting the Hawaiian liquor industry clearly violated the Commerce Clause. The Court cited *Walling v. Michigan*, 116 U.S. 446 (1886) (striking down a law imposing a tax on the sale of alcoholic beverages produced outside the state). *Bacchus, supra*, 468 U.S. at 271. The Court also cited *Welton v. Missouri*, 91 U.S. 275 (1876) (striking down a statute discriminating against goods " 'which are the growth, product or manufacture of other states or countries. . . . ' "). *Bacchus, supra*, 468 U.S. at 271.

Critically, once it is recognized that the purpose of the Georgia statute was (and remains) protectionist, a fact conceded by the lower courts in Georgia, the principles enunciated in *Bacchus* applicable to the Georgia statute become matters of long-settled precedent predating the turn of the century.

> This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulations under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925).

Brown-Forman Distillers v. N.Y. State, supra, 476 U.S. at 578-79 (1986).

Finally, *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 225 Ga. 15, 334 S.E.2d 679 (1985) (*"Scott"*), should not provide Georgia with refuge within which to hide the fruits of its discredited protectionist taxing scheme. In *Scott* in 1939 the Georgia Supreme Court upheld the forerunner of the pre-*Bacchus* statute against a Commerce Clause challenge. The Georgia Supreme Court stated in *Scott* that "It is sufficient to state that the Commerce Clause does not apply to the regulation by states of the importation of intoxicating liquor." *Id.*, 187 Ga. at ___, 2 S.E. 2d at 66.[9] Assuming there was some basis in this Court's prior decisions at the time *Scott* was decided to support such an analysis, any such basis had clearly evaporated not later than 1964 with *Idlewild* and 1980 with *Midcal*. In relying upon *Scott* in the instant case to support its holding of nonretroactivity, the Supreme Court of Georgia did not even attempt to

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[9] No attempt was made to appeal the Georgia Supreme Court's decision in *Scott v. State* to this Court.

analyze the precedent of this Court. *See Generally* J.A., pp. 102-03. Because *Bacchus* did not overrule prior precedent or decide an issue of first impression that was not foreshadowed by prior case law, *Bacchus* clearly fails the first of *Chevron Oil's* three tests for nonretroactive application.

B. Retrospective Application of *Bacchus* will Clearly Further the Operation and Intent of the Commerce Clause

Where a judicial decision does not meet the first of the *Chevron Oil* criteria, there is no occasion even to consider the remaining criteria, and the decision is applied in the customary retroactive manner. *See Ashland Oil, supra*, 58 U.S.L.W. at 3832 ("Because *Armco* did not overrule clear past precedent or decide a wholly new issue of first impression, it does not meet the first prong of the *Chevron Oil* test. *Armco* thus applies retroactively. . . . ") Even so, the remaining *Chevron Oil* criteria clearly militate in favor of retroactivity in this case.

The second prong of the *Chevron Oil* test, as noted by the Court in *ATA*, requires the Court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 58 U.S.L.W. at 4707, *citing Chevron Oil*, 404 U.S. at 106-107 (citations and internal quotations omitted). In *ATA* the Court concluded, however, "that the purpose of the Commerce Clause does not dictate retroactive application of *Scheiner*. . . . " *ATA, supra*, 58 U.S.L.W. at 4708. The distinction between *ATA* and the instant case

as respects furthering the purpose of the Commerce Clause is revealed in the following statement from *ATA*: "[T]he HUE tax was entirely consistent with the underlying *Aero Mayflower* line of cases and it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce. *See Complete Auto Transit*, 430 U.S. at 288." *ATA, supra*, 58 U.S.L.W. at 4708. Conversely, as the foregoing discussion in Section II.A reveals, the State of Georgia has no claim to a clear line of case authority supporting its taxing scheme. Moreover, Georgia's own courts have determined that the tax was not a "legitimate state taxation of interstate commerce," but rather a form of invidious discrimination, the likes of which the Commerce Clause was specifically enacted to prohibit.

The compelling need for a backward-looking remedy in the instant case springs from the pages of the documents produced by the State to Beam prior to the trial court's summary judgment order below, and excerpted in the Factual Background, *supra*, pp. 5-8. The Court has specifically recognized intransigence in the application of its decisional principles as a valid consideration under the second prong of *Chevron Oil. See Florida v. Long*, 108 S.Ct. 2354, 2362 (1988) ("[r]etroactive awards are not necessary to further Title VII's purposes and to ensure compliance with this Court's decisions since Florida acted immediately . . . to correct its discriminatory optional plans . . . ").

Had the State of Georgia reacted to *Bacchus* in a manner consistent with the Constitution, perhaps the need for a deterrant application of *Bacchus* would be less justified. In the instant case, however, the State

immediately sought ways to mask its actions such that it could avoid the effect of *Bacchus* without even attempting to square the actual intent behind or effect of the post-*Bacchus* statute with the constitutionally mandated federal interests promoted by the Commerce Clause. The primary concern of the State was not to "let [the] U.S. Supreme Court change [Georgia's] public policy" of protecting local growers from foreign competition.

Plainly the effect of the post-*Bacchus* statute remains identical to that of the pre-*Bacchus* statute with only a "makebelieve" legitimate purpose appended to the enacting legislation. This Court should not sanction such invidious behavior by a state legislature. In fact, absent retroactive relief, the states may forestall indefinitely any remedy by effecting cosmetic changes to statutes held to be unconstitutional, as the State of Georgia has done in this case.[10]

Moreover, retroactive application of *Bacchus* in this particular instance will further the implied purpose of the Commerce Clause by helping to redress the competitive

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[10] The post-*Bacchus* statute was challenged as unconstitutional in *Heublein, Inc. v. State, supra*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 107 S.Ct. 3253 (1987). However, at the time that *Heublein* was decided in January of 1987 counsel for Beam (who were also counsel for Heublein) did not have available to them the documentary evidence presented in this case to establish the illegitimacy of the amended statute. (As indicated, these documents were produced through discovery in this case, the Complaint for which was not filed until April of 1987.) Therefore, Heublein was not in a position to question the stated purpose of the amended statute, which went "unchallenged." *See Heublein*, 351 S.E. 2d at 196.

imbalance imposed by the State of Georgia against out-of-state liquor manufacturers. Pursuant to the remedial requirements imposed on the states in *McKesson*, Georgia would be required in some way to put in-state and out-of-state manufacturers back on an equal footing, either by refunding the taxes assessed against the Petitioner, assessing additional taxes against its in-state competitors, or some combination of the two. This of course cannot but help to restore the parties to their respective competitive positions had the protectionist legislation never been implemented.

Clearly, promoting competition in the free market among and between the various states is a purpose driving the Commerce Clause. Just as clearly, restoring the competitive balance distorted by the Georgia legislature in this case will advance that purpose.

C. No Inequity Would be Imposed by Retroactive Application of Bacchus

The third criterion for nonretroactivity established in *Chevron Oil* is that a decision should not be given retroactive application where such an application "could produce substantial inequitable results. . . . " *Chevron Oil, supra,* 404 U.S. at 107. As far as equitable considerations are concerned, the State of Georgia does not come into this Court with clean hands.

In *ATA,* in considering the equities involved, this Court gave careful consideration to the State's good faith belief in the propriety and constitutionality of its taxing scheme, based upon a scheme declared valid by this Court in cases such as *Aero Mayflower Transit Company v.*

Board of Railroad Comm'rs, 332 U.S. 495 (1947). In the instant case, however, the Georgia Legislature not only had every reason, by as early as 1964, to believe its taxing scheme unconstitutional, but sought to retain that scheme even after it was definitively declared so by this Court. Moreover, there is not even a hint that in enacting the statute in question Georgia sought to regulate or control alcoholic evils; rather the evidence demonstrates conclusively that Georgia sought to promote trade in alcoholic beverages, albeit with an eye towards promoting in particular Georgia's in-state manufacturers.

In *ATA* this Court made the following observation with respect to the equities involved in retroactive application of *Scheiner*:

> In sum, we conclude that applying *Scheiner* retroactively would 'produce substantial inequitable results.' *Chevron Oil,* 404 U.S., at 107. The invalidation of the HUE tax has the potential for severely burdening the State's operations. *That burden may be largely irrelevant when a State violates constitutional norms well established under existing precedent.* See *McKesson.* But we think it unjust to impose this burden when the State relied on valid existing precedent in enacting and implementing its tax.

ATA, 58 U.S.L.W. at 4709 (emphasis supplied). By contrast, in the instant case the burden on the State of Georgia should be "largely irrelevant" because the State continued to "violate[] constitutional norms well established" long after the State had any right to assume that its protectionist scheme was constitutional.

Moreover, the financial burden on Georgia is clearly circumscribed by its three year statute of limitations.

Because more than three years have expired since this statute was amended, all claims that can be brought under the pre-*Bacchus* statute have in fact been brought, and the amount of refund money at stake is a known quantity. Thus, any force behind the argument that a retroactive application of *Bacchus* would disrupt the State's budgeting and financial planning is dissipated. Also, under *McKesson*, the Georgia Department of Revenue could simply issue "credit memos" to those with valid refund claims. These memos would allow those companies victimized by the pre-*Bacchus* statute to recoup their losses over time, using the memos to claim tax exemptions up to the amounts unconstitutionally collected. In short, *McKesson* grants the states broad latitude in fashioning remedies tailored to avoid any disruption of the states' budgeting and financing processes. Having put into effect a statute that expressly contemplates that taxes may have to be refunded (see Holmes, J., *supra*, at p. 17) the State now claims that it would be incovenient to refund so large a sum. In substance, the State claims allowance to redress its smaller overcollections while ignoring the larger ones – a ridiculous notion. To allow the states to escape retribution under a pretext that amounts to a claim that it would be "inconvenient" to redress the inequity could hardly promote the deterrence of similar such conduct in the future.

III. AT A MINIMUM, THE STATE MUST GRANT BEAM RETROSPECTIVE RELIEF WITH RESPECT TO TAXES PAID AFTER JUNE 29, 1984, THE DATE *BACCHUS* WAS DECIDED

This Court decided *Bacchus* on June 29, 1984. The State has absolutely no argument available to it to deny

Beam retrospective relief for taxes paid on sales of alcohol after that date. For all of the reasons stated above, Beam should be granted retrospective relief with respect to all of the taxes it paid pursuant to the pre-*Bacchus* statute in 1982, 1983 and 1984. At a minimum, even should this Court decline to apply *Bacchus* retroactively, the Court should remand the case to the Georgia courts for a determination of the amount of taxes paid by Beam pursuant to the constitutionally infirm statute after June 29, 1984. Once that determination has been made, Beam is entitled at a minimum to retrospective relief with respect to that portion of the taxes paid.

CONCLUSION

The judgment of the Supreme Court of the State of Georgia should be reversed with respect to the issue of whether the Petitioner is constitutionally entitled to a remedy for the State's imposition of the unconstitutional pre-*Bacchus* statute.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISION INVOLVED

The following state excise taxes are levied and imposed:

> (1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;
>
> (2) On the manufacture of all distilled spirits manufactured in this sate from Georgia-grown products, a tax of $ .50 per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of $ .70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter.

O.C.G.A. § 3-4-60 (1982).

AMENDED § 3-4-60

The following state taxes are levied and imposed.

(1) There shall be imposed upon the first sale, use, or final delivery within this state of all distilled spirits an excise tax in the amount of $ .50 per liter and, upon the first sale, use, or final delivery within this state of alcohol, an excise tax in the amount of $ .70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all distilled spirits an import tax in the amount of $ .50 per liter and, upon the importation for use, consumption, or final delivery into this state of all alcohol, an import tax in the amount of $ .70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter; and

(3) All alcohol spirits manufactured within this state for sale within this state shall be made from Georgia grown products.

O.C.G.A. § 3-4-60 (1985).

United States Constitution, Article 1, Section 8, clause 3:

The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

REFUND PROVISION

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b)(1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his counsel's service in the armed forces during such period, the period of limitation shall date from his or her counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of this action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date the claim

is denied. The two-year period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

O.C.G.A. § 48-2-35 (1982).